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No. 233.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), and LOCAL 1114 UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),

Petitioners,

v.

GOODMAN MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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GOODMAN MANUFACTURING COMPANY and NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

United Electrical, Radio and Machine Workers of America and Local 1114 United Electrical, Radio and Machine Workers of America pray that a writ of certiorari be issued to review the judgments of the United States Court of Appeals for the Seventh Circuit denying the petition of the National Labor Relations Board for enforcement of its order against the Goodman Manufacturing Co., and denying the motion of the United Electrical, Radio and Machine Workers of America, and Local 1114 for leave to intervene.

The Opinions Below

The first opinion of the court below (Appendix B, infra pp. 22-29) is reported at 227 F. 2d 465. The second opinion (Appendix B, infra pp. 30-37) is not yet officially reported. The opinion and order of the Board (Appendix C, infra pp. 38-43) is reported at 111 N. L. R. B. 369. The interim opinion of the Board (Appendix C, infra pp. 44-46) is not reported.

Jurisdiction

The first judgment of the Court of Appeals for the Seventh Circuit denying enforcement of the Board's order was entered November 10, 1955. The judgment denying the Union's motion for leave to intervene was entered April 6, 1956. The judgment after reargument upon the merits was entered June 15, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and Sections 10(e) and 10(f) of the National Labor Relations Act.

Questions Presented

1. Whether Section 9(h) of the National Labor Relations Act may constitutionally be applied to require as a precondition for union access to the Board's processes that officials of a union, who have no power by virtue of their union position to call or lead strikes, file non-Communist affidavits with the Board.

2. Whether a union may be held not to be in compliance with the filing requirements of the Act by reason of the failure of some of its officials to file non-Communist affidavits, without the union being afforded a hearing on the question of whether or not those officials are "officers" of the union.

3. Whether officials whom the constitution of a labor organization does not list among its "officers" are "officers" of the union within the meaning of Section 9(h) of the Act and the Board Regulations.

4. Whether a union, charging party before the Board, may intervene in an enforcement proceeding where its compliance status under Section 9(h) of the Act is in question.

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions involved are the First and Fifth Amendments to the Constitution of the United States. Their relevant portions are as follows:

"AMENDMENT 1

> Congress shall make no law * * * abridging the freedom of speech; or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"AMENDMENT 5

> * * * nor shall any person * * * be deprived of life, liberty, or property without due process of law."

Section 9(h) of the National Labor Relations Act as amended, 61 Stat. 136, 146, 65 Stat. 601, 602, 29 U. S. C. 159 (h) is set forth in the Appendix (*infra* p. 47). Sections 5(a) and 5(b) of the Administrative Procedure Act, 60 Stat. 237, 239; 5 U.S.C. 1004 is set forth in the Appendix (*infra* pp. 47-48). Section 102.13 of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F.R. 1934, 1938, 29 F.R. 102.13, is set forth in the Appendix (*infra* p. 48).

Statement

The Proceeding Below—This case arises in the context of an unfair labor practice proceeding commenced against the Employer, Goodman Manufacturing Co., on February 5, 1953, by a complaint charging it with refusal to bargain with the Union, United Electrical, Radio and Machine Workers of America (UE), and its Local 1150, the statutory collective bargaining agents of the Employer's production and maintenance employees (R. 106).[1] (The petitioner, Local 1114, is the successor to Local 1150.) At no time in this proceeding has it been held that the Employer was not guilty as charged in the complaint.

The questions presented here arise from the ruling of the court below that the Trustees of Union and the Secretaries of the Union District Councils (who had not filed the non-Communist affidavits required by Section 9(h) of the Act) were "officers" of the Union, and hence that the Union was not in full compliance with the filing requirements of Section 9(h) of the Act either at the time of certification by the Board, or at the time its unfair labor practice charges against the Employer were processed. Accordingly, the court below denied the Board's petition for enforcement and set aside the Board Order requiring the Employer to bargain with the Union.

The Employer first charged that the Union was not in full compliance with Section 9(h) by means of a motion filed with the Board at the start of the unfair labor practice proceeding (R. 111). This motion questioned the compliance status of both the Trustees and District Secretaries. The Board thereupon issued a notice to the Union, directing it to show cause why the Union should not be held out of compliance because of the failure of the persons elected to the position of Trustee to file the affidavits (R. 133). (The

[1] References to the printed Appendix below are preceded by the letter "R".)

Board never directed a hearing on the question of the District Secretaries.) The Union replied to the Board's notice by submitting an affidavit of its General Counsel (R. 134) and the Employer responded by a verified Reply Memorandum (R. 174). On August 6, 1953, the Board held the Union to be in compliance (R. 183), a ruling to which it subsequently adhered (R. 276).[2]

The Status of the Trustees—The Constitution of the Union provides in part as follows:

> "Article 5, Section A—The Officers of the United Electrical, Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon."

The duties of the trustees are limited to a quarterly audit of the records of the Union office, and to making an annual inventory of Union property and tabulating the results of Union referenda (Articles 9, 11; App. E, pp. 40-41 infra). The method of selection of Trustees (as provided by Article 9, Section A; App. E, p. 41 infra) differs substantially from that provided for selection of Officers (Article 5, Section B; App. E, p. 40 infra).

The Board's Ruling—On the basis of the above facts, the Board concluded that the Trustees were not officers of the Union within the meaning of the Act and the Board regulation. The Board stated:

> "Section 102.13 of the Board's Rules and Regulations provides, in part, that the term 'officer' for the purpose of Section 9(h) of the Act 'shall mean any person occupying a position identified as an office in the constitution of the labor organization * * *.'

[2] The Employer also raised the status of the Trustees and District Secretaries, by Answer (R. 130, 132) and at the hearing. Those objections appear to have been merely pro forma to preserve the record (R. 191).

> "* * * The Union contends, inter alia, that its constitutions clearly differentiate between Trustees and officers. We agree. We are of the opinion that only the officials referred to in the first sentence of the above Article 5, Section A, are officers."

The Board further stated that it had not considered the Employer showing with regard to the District Secretaries sufficient to merit further proceedings. Subsequently, the Board found the Employer had violated the Act by refusing to bargain with the Union (App. C, *infra*).

The Decisions of the Court of Appeals on the Merits—The court below did not reach the merits of the Board's unfair labor practice findings. Instead, it ruled that the Board was without jurisdiction to consider the case by reason of the failure of the Trustee and District Secretaries to file the affidavits. The court below held that these persons came within the Board Regulations as "persons occupying a position identified as an office in the constitution of the labor organization".

In its first opinion the court below held that since the positions of Trustee and District Secretary were established by the Union Constitution, the occupants of those positions were "officers" within the meaning of the Board Regulations even though "the International's Constitution does not confer the title 'officer' upon District Secretaries and Trustees or describe their respective positions as 'offices'" (App. B, infra, p. 27). In the court's opinion, this fact brought those persons within the scope of the holding of *A.C.A.* v. *Douds*, 339 U. S. 382, as persons, who, "as officers * * * direct union activities" (339 U. S. at p. 407) and persons who "hold official power" (Frankfurter, J., concurring at p. 418).

Following the decision of this Court in *N.L.R.B.* v. *Coca Cola Bottling Co. of Louisville*, 350 U. S. 264, the court below ordered reargument. It then withdrew its former opinion and substituted another in which it again denied enforcement of the Board's order.

In its second opinion the court again held that the positions involved were "identified" as officers within the meaning of the Board Regulation, even though they were not set out in the list of officers. The court now grounded this position on a holding that the term "identified" as used in the Board Regulations carried a broader meaning than would the term "designated". According to the court below, the fact that the officials involved, as well as "officers", were accorded "recognition" by the Union Constitution and the fact these positions were responsible ones, brought them within the Board Regulations which this Court approved in *Coca Cola*. The court distinguished *Coca Cola* on the ground that the positions there involved were not established by the constitution.

The Intervention Question—The Union, as charging party, had intervened in the Board proceeding and been made a party. Previous rulings of the Court of Appeals for the Seventh Circuit had made it clear that any effort to intervene in the enforcement proceeding would be futile. *Aluminum Ore Co.* v. *N.L.R.B.* (C. A. 7, 1942), 131 F. 2d 485; *Stewart Die Casting Co.* v. *N.L.R.B.* (C. A. 7, 1942), 132 F. 2d 801; *American Newspaper Publishers Association* v. *N.L.R.B.* (C. A. 7, 1951), 190 F. 2d 45. Accordingly, the Union did not seek to intervene prior to the first decision of the court below.

Subsequent to the first decision below, and within the time fixed by the court rules for a petition for rehearing, the Union filed a motion for leave to intervene and submitted a petition for rehearing. This motion was opposed both by the Employer and the Board. The Employer contended that such intervention was foreclosed under previous holdings of the court below, was untimely, and that the Union's position was adequately represented by the Board. The Board, on the other hand, contended that such intervention would "by according the charging party the status of a party in the court proceeding, put it in a position to

petition for certiorari against the wishes of the Board and thus deprive the Board of control over the litigation." [3]

On December 19, 1955, the court below denied the Union's motion.

Following the *Coca Cola* decision the Board moved to vacate the judgment below and for further consideration of the case. The Union also filed such a motion and again moved to intervene. The court below vacated its prior judgment and set the case on the docket for further hearing. At the same time, the Union's motion to intervene was denied "without prejudice to its right to appear as amicus curiae, file briefs and participate in any argument herein". Subsequently, the Union did file a brief amicus curiae and participate in the oral argument.

Reasons for Granting the Writ

The First Amendment Question

1. In *American Communications Association* v. *Douds*, 339 U. S. 382, the Court recognized that the limitations which Section 9(h) imposes upon the freedom of the millions of union members to choose their officers and upon the freedom of union officers to choose their political belief present a "grave and difficult problem" of the application of the First Amendment guarantee of political freedoms (339 U. S. at p. 393). As far as the constitutionality of 9(h) on its face was concerned, the court resolved these problems in favor of the statute. It held that Congress might, in the interest of protecting interstate commerce, impose the requirements of Section 9(h) upon union members and officers. This ruling, however, rested upon the Court's acceptance of the Board's argument that Section 9(h) was aimed at those persons who by virtue of their official positions might be possessed of both the "will and

[3] Board opposition to motion to intervene (p. 2).

the power" to call political strikes without advocacy or persuasion (339 U. S. at p. 396).

The opinions of the Court and of the individual Justices bristle with emphasis upon this factor as constituting the danger to which Congress had addressed itself. The opinions leave no doubt that it was the threat to interstate commerce, placed in the hands of union officers by their official power to call political strikes, which was the prime consideration in the Court's decision. See 339 U. S. at pp. 388, 391, 392, 393, 396, 400, 401, 404, 406, 407, 412 (Opinion of the Court); pp. 416, 417, 418 (Opinion of Justice Frankfurter); pp. 430, 431 (Opinion of Justice Jackson).

The instant case, however, presents no such picture. The duties of the Trustees have not the remotest bearing on, or connection with, the calling or operation of strikes—be they political or economic.[4] Their duties lie solely in the area of the safekeeping of Union finances and supervising the counting of the ballots in any recall referendum. This case thus raises the question of the constitutionality of Section 9(h) as a restriction on the First Amendment rights of union members and officials when *applied* to officials who have no power to affect interstate commerce. As this Court pointed out in *A.C.A.* v. *Douds*, this restriction upon the rights of millions of union members to choose their officials and the rights of those members to seek official posts or serve in them without limitation of their political beliefs or affiliations, raises constitutional issues of "manifest importance" (339 U. S. at p. 387).

The Denial of a Hearing

2. The decision of the court below that the Union was not in compliance because the District Secretaries had not filed the affidavits was made on a record in which no hear-

[4] As we argue below, petitioners do not believe that the record permits an evaluation of the duties and powers of the District Secretaries in the absence of a hearing.

ing was ever held on the status of the District Secretaries. The ruling below was therefore a plain denial to the Union of the Due Process guaranteed by the Fifth Amendment. Moreover, it violated the provisions of the Administrative Procedure Act and the National Labor Relations Act.

As a consequence of the ruling below, many thousands of employees in the electrical, radio and machinery industry, are threatened with the loss of their property rights as established by collective bargaining agreements and the entire industry is threatened with consequent industrial instability. As the affidavit of Julius Emspak (submitted in support of the Motion to Intervene below) shows, collective bargaining contracts throughout the industry are bottomed upon Board certifications. These contracts not only create property rights in the Union and the employees it represents, they are the essential foundation of the stability of industrial relations to which the whole Act is directed. The decision below destroys the foundation upon which these contracts, valuable property rights, rest. Such a deprivation of property rights cannot be effected without a hearing. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123.

The denial of a hearing deprived the Union of a substantial right. At such a hearing, the Union could easily have demonstrated that the duties of the District Secretaries differ significantly from those of the Union "officers"; that the District Secretaries had no power by virtue of their position to call or lead strikes; and that the whole treatment of those positions in the Union structure and history indicated that they were not "officers" within the meaning of the Act and Regulations.

The decision below, denying the Union a hearing on the question of the District Secretaries, conflicts in more than principle with the ruling of the Court of Appeals for the Third Circuit in *Marine Engineers Beneficial Association* v. *N.L.R.B.* (C. A. 3, 1953) 202 F. 2d 546. In that case, the Third Circuit held that the Administrative Procedure Act

(5 U. S. C. 1004), and the National Labor Relations Act required that the charging party be afforded a hearing before the Board before the complaint be dismissed. See also *Fay* v. *Douds* (C. A. 2, 1949), 172 F. 2d 720, 723. (To destroy a certification without a hearing "can plausibly be thought to be a denial of due process of law.")

The ruling of the court below when read with the decision of this Court in *N.L.R.B.* v. *Coca Cola Bottling Co. of Louisville,* results in an anomaly. Under the *Coca Cola* decision an employer can, as a matter of right, contest a union's compliance status and procure a hearing before the Board and judicial review of that hearing. On the other hand, under the ruling below, a union is not entitled to a hearing in which to protect its compliance status and that status may be arbitrarily destroyed by the court.

The Conflict with *N.L.R.B.* v. *Coca Cola Bottling Co. of Louisville*

This Court in *N.L.R.B.* v. *Coca Cola Bottling Co. of Louisville,* has recently upheld the Board's definition of the term "officers" as used in Section 9(h) as meaning those persons who hold positions identified as an office by the appropriate union constitution. The decision of the court below, holding the Trustees and District Secretaries to be "officers" of the Union, is in conflict with the decision of this Court in *Coca Cola,* and should be reversed. The court below misconstrues the Board's definition of "officers" which this Court approved and broadens the term "identified" beyond its proper meaning.[5] In so doing, the

[5] Had the term been restricted to the narrower limits which the Board intended, the holding below would have been impossible in view of Article 5(a) of the Union Constitution:

> "The officers of the United Electrical, Radio and Machine Workers, shall be the General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon."

decision reopens the Pandora's box of time-consuming delays and frustrations of the Act which this Court sought to close by its decision in *Coca Cola*.

The first decision below confessedly did not follow the Board Regulation. The court's "constitutional test"—unlike the Board's—depended, not upon whether the union constitution identified the position as an "office" or its occupant as an "officer," but upon whether the position was established by the constitution; not upon the constitutional treatment of the position but upon its constitutional source. The second decision below only appeared to abandon this "constitutional test." It ushers the same test in through the back-door by raising an ambiguity from the fact that the constitution gives "recognition" to the positions here involved. It again relies upon the constitutional source, rather than the constitutional treatment of the positions involved. Moreover, the court below compounded its error by using the same test to resolve this "ambiguity" which this Court rejected in *Coca Cola*—the "functional" test of the duties of the position.[6] The holding is thus the same in both opinions: 9(h) reaches any position established by a union constitution whether or not it be denominated an "office".

The Board Regulations, like the Act itself, are designed to narrow the area of dispute in Board proceedings.[7] Contrary to the decision below, the word "identified" in the Board Regulation, approved in *Coca Cola*, has no broader meaning than "designated." The Board has consistently interpreted its own regulation as applying only to those persons designated as officers in the union constitution. In its 13th Annual Report (for the fiscal year 1948), the first year in which it administered the Labor Management Relations Act, the Board said:

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[6] The court below also relied, secondarily, upon the discussion at the 1952 union convention. It is submitted that this discussion is as compatible with the Union and Board position as with the Employer's.

[7] The legislative history showing the desire of Congress to limit disruption of proceedings by the raising of 9(h) questions was set out in the Board's brief in *Coca Cola* (pp. 20 ff).

> "If the persons who are, in fact, formally entitled 'officers' of a labor organization have filed the proper affidavits that organization is deemed to be in compliance with Section 9(h) as far as the Board is concerned" (p. 24).

The expansion of the Board's definition of "officer" by the court below to include persons not "formally entitled officers" is thus contrary to the intent of the regulation and does violence to its purpose.

The distinction which the union constitution makes between "officers" and "trustees" is not an ephemeral one. It is deep-rooted in the structure of the organization.[8] Under the Union constitution, trustees are in effect a membership committee chosen for the primary purpose of auditing the disbursements of union funds by union officers. This is in line with customary union practice. As Kosmetsky states in his book "Financial Reports of Labor Unions" (Division of Research, Harvard University Graduate School of Business Administration, 1950):

> "Usually unions that provide for only an internal audit of the financial records select an internal auditing committee from the membership, and, to insure the objectivity of the audit, exclude the union officers" (at p. 200).

The whole structure of the Union counterposes the Trustees against the "officers". Rather than being "officers" of the Union, the Trustees are their exact opposite. It will be noted in this regard that whereas the officers are elected by a plurality of the votes at the Convention, Trustees are chosen by a method calculated to insure representation of the whole membership (Article 9A, p. 50, infra).

The impact of this decision is not limited to this Union alone, great as that impact is. The Union's constitutional structure follows a pattern common to the labor movement.

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[8] As we have stated, we do not think the record permits a discussion of the duties of the District Secretaries.

Labor unions, like all voluntary fraternal associations have many posts. In addition to the customary posts of President, Secretary, etc., it is common to have numerous committees (sick committee, credit union committee, political action committee, etc.), all with their attendant chairmen and secretaries, as well as a host of other minor posts, any or all of which may be established by the constitution, to be filled by the members of the association. These posts vary in their importance, some being almost entirely honorific and some carrying with them the full executive power of the union. Under common union practice, only those positions which involve the exercise of primary responsibility for the management of the union are designated as "offices" in the union constitution and it is only for those positions that the 9(h) affidavits have been filed. The decision below thus has affected almost every union.[9] Since present day collective bargaining agreements are customarily bottomed upon Board certifications, the decision unsettles industrial relations nationally and jeopardizes a multitude of pending unfair labor practice and representation proceedings.

The Denial of Intervention

4. The ruling of the court below, denying the Union a right to intervene before it, is in conflict in principle with the decisions of the Court of Appeals for the District of Columbia on the general Federal law governing intervention, and, with other Courts of Appeals on the question of the rights of a charging party under the National Labor Relations Act.

In *Textile Workers Union of America* v. *Allendale Co.* (C. A. DC 1955), 226 F. 2d 765, the court (sitting in banc) held that a union might intervene in a District Court pro-

[9] It will be noted that the International Union of Electrical, Radio and Machine Workers (IUE, AFL-CIO) had not filed affidavits for its trustees (R. 138).

ceeding to review minimum wage determinations by the Secretary of Labor under the Public Contracts Act.[10] The court pointed out that even though the judgment might not be res adjudicata as to the union in a technical sense, in a practical sense the union was "bound" by the determination, and hence had an absolute right to intervene. It held that, in any event, the economic stake of the union in the outcome of the proceeding made the denial of intervention an abuse of discretion.

Wolpe v. *Poretsky* (C. A. D. C., 1944), 144 F. 2d 205, held that adjacent property owners, whose interests might be affected, should be permitted to intervene in an action against the Zoning Commission even though final judgment had been handed down and the time for filing a motion for new trial had expired.

The District of Columbia opinions are directly contrary to the ruling below denying the motion to intervene. In the *Textile Workers* case, as in this one, the union had initiated the administrative proceeding. In both cases, serious damage might be caused the union and its members by the decision below unless reversed. And in *Wolpe* v. *Poretsky*, as in this case, intervention was necessary to protect a right to appeal.

The Union's interest in this case could not be adequately protected by the Board. As the Board itself stated in opposing the intervention, the Board's decision to appeal is not based solely upon its view of the merits of the case, but upon its view of the "impact of the decision upon the policies of the Act." There is thus no guarantee that any petition for certiorari will be filed by the Board in this case. Further, it is highly unlikely that the Board will raise the issues of the political liberty and due process raised here. (The Union has raised them at each stage of the proceeding.) The Board did not raise them below. And the Board's administration of Section 9(h) has been

[10] 49 Stat. 2036-2040, 41 U. S. C. Section 33-45.

as much in the direction of an expansion of its power and jurisdiction as toward recognition of any limitation of its powers. Cf. *Farmer* v. *United Electrical Radio and Machine Workers of America* (C. A. D. C., 1953), 211 F. 2d 36; *N. L. R. B.* v. *Coca Cola Bottling Co. of Louisville*, supra.

In the *Textile Workers* case, the agency there argued that the interest of the union members was adequately represented by itself. The Court of Appeals nonetheless recognized that a party interested in the outcome of a proceeding should be permitted to "plead for themselves" (226 F. 2d at p. 765).

This Court has recognized that Rule 24 of the Federal Rules of Civil Procedure is not a "comprehensive inventory of the allowable instances for intervention." *Missouri Kansas Pipeline Co.* v. *U. S.*, 312 U. S. 502, 505. Petitioners believe that in every respect, except the forum of the District Court, the motion to intervene met the criteria of that rule. Certainly, it met what Professor Moore has described as the standard governing modern intervention practice, "the purpose of the courts to prevent their processes from being used to the prejudice of the rights of interested third persons." 4 Moore's Federal Practice 14 (2d Ed. 1950).

5. Although this Court has not ruled directly upon the right of a charging party to intervene in an enforcement proceeding under the Act, its rulings leave little doubt as to the existence of this right. In *International Union of Mine, Mill and Smelter Workers* v. *Eagle Picher Mining and Smelting Co.*, 325 U. S. 335, this Court upheld the right of the union (intervenor below) to seek review of a decision denying the relief sought by the Board, even though the Board did not seek review. Customarily, some Courts of Appeals have permitted a charging party to intervene in enforcement proceedings. Cf. *Eagle Picher Mining and Smelting Co.* v. *N.L.R.B.* (C. A. 8, 1941), 119 F. 2d 903; *Consolidated Edison Co.* v. *N.L.R.B.* (C. A. 2,

1938), 95 F. 2d 390. The Court of Appeals for the Seventh Circuit has however—in direct conflict with other Circuits—consistently refused to permit such intervention. *Aluminum Ore Co.* v. *N.L.R.B.* (C. A. 7, 1942), 131 F. 2d 485; *Stewart Die Casting Co.* v. *N.L.R.B.* (C. A. 7, 1942), 132 F. 2d 801; *American Newspaper Publishers Association* v. *N.L.R.B.* (C. A. 7, 1951), 190 F. 2d 45, certiorari denied 344 U. S. 812. The question here involved is of manifest importance in the administration of the Act. The plain conflict between the Circuits should be resolved by this Court.

The position of the court below results in an absurd procedural situation. It is uncontested that a charging party may appear in the Board proceeding and, under Section 10(f) of the Act, appeal a final order of the Board denying it the relief sought to a Court of Appeals. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 264. It could not have been intended by the Act that a charging party might have the right to appeal as a party against an adverse ruling by the Board and yet be powerless to appear as a party to prevent an equally disastrous adverse ruling in the Court of Appeals or to appeal to this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 3, 1956.

APPENDIX A

Decrees Sought to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

April 6, 1956

Before HON. J. EARL MAJOR, *Circuit Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. ELMER J. SCHNACKENBURG, *Circuit Judge*

[CAPTION.]

Motion of National Labor Relations Board to vacate the judgment in the above entitled case is allowed and the case is reinstated on the docket for further hearing and consideration. The motion of United Electrical, Radio and Machine Workers of America (UE), and Local 1114 United Electrical, Radio and Machine Workers of America (UE), filed March 8, 1956, is denied without prejudice to its right to appear as amicus curiae, file brief and participate in any oral argument herein if it sees fit.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, June 15, 1956

Before HON. J. EARL MAJOR, *Circuit Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. ELMER J. SCHNACKENBURG, *Circuit Judge*

[CAPTION.]

This cause came on to be heard on the question of the impact, if any, of the Coca Cola Company decision of the Supreme Court of the United States on the opinion of this court heretofore filed on November 10, 1955 in this cause, the petition for review of an order of the National Labor Relations Board entered therein on January 28, 1955, the answer and request for enforcement of said order, and the certified transcript of record, and was argued by counsel.

On consideration whereof it is ordered and adjudged by this court that the opinion of this court heretofore filed on November 10, 1955 be withdrawn and the opinion of this court filed this day be substituted therefor.

It is further ordered and adjudged by this court that the order of the National Labor Relations Board entered therein on January 28, 1955 be, and the same is hereby set aside and vacated, and the request of the National Labor Relations Board for enforcement of said order is hereby denied.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, December 19, 1955

Before HON. J. EARL MAJOR, *Circuit Judge*
HON. WALTER C. LINDLEY, *Circuit Judge*
HON. ELMER J. SCHNACKENBURG, *Circuit Judge*

[CAPTION.]

It is ordered that Motion of United Electrical, Radio and Machine Workers of America (UE), and Local 1114 United Electrical, Radio and Machine Workers of America (UE), successor to Local 1150 United Electrical, Radio and Machine Workers of America (UE), for leave to intervene and for leave to file petition for rehearing be DENIED.

APPENDIX B

Opinions of the Court of Appeals

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11403 OCTOBER TERM AND SESSION, 1955.

[CAPTION.]

November 10, 1955.

Before MAJOR, LINDLEY and SCHNACKENBURG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is a petition to review and set aside an order of the National Labor Relations Board, entered January 28, 1955, against Goodman Manufacturing Company of Chicago, Illinois. By the Board's order, petitioner was found guilty of an unfair labor practice under § 8(a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. A. § 158(a)(5) and (1), because of its refusal to bargain with the United Electrical, Radio and Machine Workers of America as the exclusive representatives of certain of petitioner's employees who are in what the Board had determined to be the "appropriate unit." Petitioner was ordered to cease and desist from the unfair practice and to take the customary affirmative steps to give effect to the Board's order. By its answer the Board requested enforcement of its order.

The composition of the "appropriate unit" is the generating cause of this controversy. The facts from which the controversy developed are these: In 1944, United Electrical, Radio and Machine Workers of America (here-

inafter called the International) was certified as the exclusive bargaining agent for certain factory production and maintenance employees at petitioner's Chicago plant. At that time, the Board determined that the employees who were then styled "timekeeping clerks" should not be included in the bargaining unit. Subsequently, in 1951, upon a petition filed by the International, the Board changed its position. Over petitioner's objections, the Board decided that these timekeeping clerks or "timekeepers," as they are presently styled, could be appropriately included in the previously certified bargaining unit if they so desired. Two elections were held in which the timekepers were permitted to choose either to be included in the unit with the production and maintenance workers or to have no collective bargaining representation. The record does not show the results of the first election, although it is stated in the Board's brief that all of the timekeepers voted for inclusion. In the second election, the result of which was certified on September 17, 1952, a majority of the timekeepers again voted for inclusion. After the second election, petitioner refused to bargain with Local No. 1150 of the International (hereinafter called the Local Union) as the timekeepers' representative. On November 19, 1952, the Local Union charged petitioner with unfair labor practices and on February 5, 1953, the general counsel of the Board issued a complaint.

Throughout these proceedings petitioner has sought to justify its refusal to bargain on two grounds. The first is the claimed impropriety of the Board's inclusion of the timekeepers in the bargaining unit with the production and maintenance workers. The timekeepers, says petitioner, are an echelon of management, and the Board's action creates a serious situation of divided loyalties and is so arbitrary and unreasonable as to be unlawful. The second ground is the asserted non-compliance by the International, District Council No. 11 of the U. E. R. & M. W. A., and the Local Union with the non-communist affidavit provision

added to the National Labor Relations Act in 1947, 29 U. S. C. A. § 159(h). The statute requires that local union officers and the officers of any labor organization with which the local is affiliated file non-communist affidavits as a prerequisite to the Board's authority to issue a complaint. The District Secretaries and Trustees of the International, at times relevant to this unfair labor practice proceeding, had not filed such affidavits. These officials, according to petitioner, are officers within the meaning of the statute; hence, the charge of non-compliance.

The first of these grounds directly involves the substantive merits of the controversy, while the second is jurisdictional in character. Accordingly, we should first direct our attention to the second ground because it has been definitely settled that a valid complaint, arising from a local union's charge of an unfair labor practice, may be issued against an employer only if the statute's anti-communist requirement has been satisfied. *N. L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *N. L. R. B.* v. *Dant et al.*, 344 U. S. 375; *N. L. R. B.* v. *Atlanta Metallic Casket Co.*, 205 F. 2d 931.

When specific application is made of this general proposition, the question arises as to how and by whom it is to be determined whether there is such compliance. The Board contends that the matter is one for its own exclusive administrative determination, and that an employer may not litigate the compliance issue in an unfair labor practice proceeding. Considerations based on the policy of the National Labor Relations Act lend some weight to this argument. The effective administration of the Act and the disposition of unfair labor practice charges should not be unnecessarily hampered or delayed. Nevertheless, the Board's present contention is too broad, for the Supreme Court has recognized that under some circumstances there may properly be judicial review of a union's compliance status.

In *N. L. R. B.* v. *Highland Park Mfg. Co., supra,* after holding that the C. I. O. was a labor organization, the Supreme Court affirmed the decision of the Court of Appeals which denied enforcement of a Labor Board order requiring the employer to bargain. The basis for the decision was the admitted fact that certain national officers of the C. I. O. had not filed non-communist affidavits at times relevant to those proceedings. To be sure, the language of the *Highland Park* opinion (page 325) indicated that there are limits upon the scope of judicial review:

> "If there were dispute as to whether the C. I. O. had filed the required affidavits or whether the documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented."

But the opinion concluded (pages 325-326) with the positive statement:

> "We think * * * that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

A number of decisions by Courts of Appeals since the *Highland Park* case have developed more definite limits on the scope of judicial review of the matter of compliance. It appears that courts ought not inquire into the factual or merely formal aspects thereof. Thus, in *N. L. R. B.* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, it was held that the "veracity" of a non-communist affidavit, admittedly filed, could not be litigated in an unfair labor practice proceeding. Similarly, in *N. L. R. B.* v. *Vulcan Furniture Mfg. Co.*, 214 F. 2d 369, the issue of "the truthfulness of the affidavits" or "whether the ostensible officers filing them are the true directors of the union involved" were outside the scope of judicial review; however, express

recognition was made of the point that a different situation would have been presented if there had been "no ostensible compliance." This court, in *American Rubber Products Corp.* v. *N. L. R. B.*, 214 F. 2d 47, noted the distinction between "the *fact* of compliance," which is not litigable, and "the *necessity* of compliance, which was the issue involved in *N. L. R. B.* v. *Highland Park Mfg. Co.*"

To be contrasted with these cases is *N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville*, 219 F. 2d 441 (cert. granted, No. 79, 24 Law Week 3039, October 11, 1955), wherein the Court of Appeals for the Sixth Circuit, notwithstanding the Board's contention that such a matter could not be litigated by the employer, ordered the Board's trial examiner to take evidence with respect to the status and jurisdiction of one Taylor, the C. I. O. Regional Director for Kentucky, who admittedly had not filed a non-communist affidavit. The court's order was based squarely on the employer's right to a judicial review of the substantial legal aspects of the compliance issue, and it cited as authority the *Highland Park Mfg. Co.* case. We are aware, as noted, that the Supreme Court has granted a writ of certiorari in the *Coca-Cola Bottling Co.* case. However, since we think that the statement of the law therein is correct and not in conflict with those decisions holding that the factual and formal aspects of compliance are outside the scope of judicial review, we see no occasion to defer a *decision* in the instant case.

Under these authorities, the instant case appears to be one where judicial inquiry into the union's compliance status is proper. Here, as in the *Highland Park Mfg. Co.* and *Coca-Cola Bottling Co.* cases, there is no dispute that the union officials who petitioner claims are "officers" within the statutory meaning had not filed non-communist affidavits at relevant times. Indeed, there is no factual disagreement at all, but only a disagreement concerning the Board's conclusions from admitted facts. And if petitioner's claim that the Board reached incorrect conclusions

is well founded, then there is no legal basis for the unfair labor practice proceeding.

The Board determined, in a separate administrative proceeding, that neither the District Secretaries nor the Trustees of the International were officers within the meaning of 29 U. S. C. A. § 159(h). With respect to the District Secretaries, this determination was said to be based upon an earlier Labor Board decision, *Sunbeam Corporation*, 98 NLRB 525. With respect to the Trustees, the conclusion was reached under § 102.13(b)(3) of the Board's Rules and Regulations which, subject to an exception not here material, provides: "The term 'officer' shall mean any person occupying a position identified as an office in the constitution of the labor organization * * *." It may be noted that the conclusion that the International Trustees were not officers was made notwithstanding two earlier decisions of the Board which held that the trustees of U. E. R. & M. W. A. locals were officers within the meaning of the statute, *Compliance Status of Local No. 1150, U. E. R. & M. W. A.*, 96 NLRB 1029; *Compliance Status of U. E. R. & M. W. A. (UE), Local 1421*, 107 NLRB 147.

The Board's own regulation appears inconsistent with its conclusion. As noted, this regulation provides that an officer is one occupying a position identified as an office in the labor organization's constitution. Thus, the designation "officer" is not confined to one of the very few persons who hold highest rank and perform executive functions at the highest level. It includes those who hold positions of responsibility and trust which, in the labor organization's own view, are of sufficient importance to be established by its constitution. While the International's constitution does not confer the title "officer" upon District Secretaries and Trustees or describe their respective positions as "offices," that instrument does expressly designate that District Secretaries shall be members of the International's General Executive Board, does create the position of International Trustee, and sets forth clearly the duties

which the persons who occupy these positions are to perform. The constitutional source of these positions establishes, in large measure, their distinguishing characteristics and renders untenable the Board's argument that if District Secretaries and Trustees of the International are liable to file non-communist affidavits, such affidavits would also be required of organizers, stewards and other lower-level union functionaries.

The District Secretaries, pursuant to Article 10 of the International's constitution, together with the General President, General Secretary-Treasurer, Director of Organization, and the twelve General Vice-Presidents—all of whom are regarded by the Labor Board as officers—are members of the General Executive Board. This body exercises general supervisory and policy making powers. In these important areas, as one of the twenty-seven members of the General Executive Board, a District Secretary can exert as much control, direction and influence as any one of the executive officers or General Vice Presidents. According to the controlling interpretation of the purpose of 29 U. S. C. A. § 159(h), contained in *American Communications Assn., C. I. O., et al.* v. *Douds*, 339 U. S. 382, the non-communist affidavit requirement is directed at persons "when, as officers, they direct union activities" (page 407), or, as alternatively phrased in Mr. Justice Frankfurter's concurring statement, at persons "who hold position of official power" (page 418). The District Secretaries are in this category; therefore, we hold that they are officers. *Sunbeam Corporation*, 98 NLRB 525, relied upon by the Board, discloses nothing which would impel or even be persuasive of a different conclusion.

The International Trustees are not members of the General Executive Board, and the incidents of their positions differ in several respects from those of the other officers. Nevertheless, we hold that they, too, are officers. By Article 9 of the International's constitution, the three Trustees (there is also one Alternate) are to take charge of

the International's property, audit all of its books and records and report to the convention, by which they are elected. Also, the Trustees are the persons to whom the procedure for recalling general officers of the International is entrusted. The duties and functions of the International Trustees closely parallel those performed by the local union trustees at the local level. As noted above, the Board has twice determined that the trustees of U. E. R. & M. W. A. locals are officers. Rather than being "inapposite," we think that a valid analogy may be drawn between the two situations, and that the results in the compliance proceedings reported at 96 NLRB 1029 and 107 NLRB 147 reinforce the conclusion that the International Trustees are officers.

By disposing of this petition for review for reason of non-compliance of the District Secretaries and Trustees with 29 U. S. C. A. § 159(h), we find it unnecessary to decide whether District Council 11 of the U. E. R. & M. W. A. is a labor organization. Similarly, we do not pass upon the larger question concerning the alleged impropriety of the inclusion of the timekeepers in the bargaining unit with the production and maintenance employees. Such an issue would be ripe for judicial review, if at all, only upon a record free from the invalidating circumstance of non-compliance.

The petition to review, set aside and vacate the involved order is allowed. It follows that the Board's request for enforcement is denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 11403. OCTOBER TERM, 1955, APRIL SESSION, 1956.

[CAPTION.]

June 15, 1956.

Before MAJOR, LINDLEY and SCHNACKENBERG, *Circuit Judges.*

MAJOR, *Circuit Judge.* This is a petition to review and set aside an order of the National Labor Relations Board (respondent), entered January 28, 1955, against Goodman Manufacturing Company of Chicago, Illinois (petitioner). By the Board's order petitioner was found guilty of an unfair labor practice, in violation of Section 8 (a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. A. Section 158 (a)(5) and (1), because of its refusal to bargain with United Electrical Radio and Machine Workers of America (hereinafter referred to as the International Union) as exclusive representative of certain of petitioner's employees in a unit which the Board had determined to be appropriate. Petitioner was ordered to cease and desist from such unfair labor practice and to take the customary affirmative steps to give effect to the Board's order. By answer the Board requests enforcement of its order.

The employees in dispute and about whom the controversy on the merits revolves are certain timekeepers employed by petitioner. Throughout these proceedings petitioner has sought to justify its refusal to bargain on two grounds: (1) that such timekeepers were improperly placed in a bargaining unit with certain production and mainte-

nance workers, and (2) that the International Union was not in compliance with Section 9 (h) of the National Labor Relations Act (39 U. S. C. A. Sec. 159 (h)).

The unfair labor practice charge upon which the complaint issued was filed by Local 1150, United Electrical Radio and Machine Workers of America (hereinafter referred to as the Local Union) on November 19, 1952. The factual situation is somewhat confused because there are affiliated with the International Union geographical district organizations (District 11 is here involved), each of which has a governing body known as the District Council (District Council 11 is here involved), together with Local Unions which receive their authority either from the appropriate District Council or the International Union or both. In addition to petitioner's contention that the unit determined by the Board was not appropriate and that the International was not in compliance with Sec. 9 (h), it contends that District Council 11 was a labor organization within the terms of the Act and that it also was not in compliance. This latter contention, as well as the others, was decided by the Board adversely to petitioner.

It now appears definitely settled that non-compliance with Sec. 9 (h) may in an appropriate case be raised as a defense to an unfair labor practice complaint and that when so raised it is jurisdictional. *N. L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322, 325; *N. L. R. B.* v. *Dant et al.*, 344 U. S. 375; *N. L. R. B.* v. *Atlanta Metallic Casket Co.*, 205 F. 2d 931. Thus we need not be concerned with other defenses raised by petitioner until and unless this jurisdictional issue is decided adversely to it.

This court, on November 10, 1955, rendered an opinion in which it held that the International Union was not in compliance with Sec. 9 (h), which resulted in a judgment setting aside and vacating the order under attack and, consequently, a denial of the Board's request for enforcement. At the time of our decision there was pending be-

fore the Supreme Court the case of *N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville*, on the issue of non-compliance, on certiorari from the Court of Appeals of the Sixth Circuit, which had decided the issue adversely to the Board (219 F. 2d 441). The Supreme Court, on February 27, 1956, rendered its opinion reversing the decision of the Court of Appeals (*N. L. R. B.* v. *Coca-Cola Bottling Co. of Louisville*, 350 U. S. 264). On March 3, 1956, the Board, contending that our decision was in conflict with that of the Supreme Court, filed its motion to vacate our judgment and to reinstate the case for further consideration. Over petitioner's contrary contention, the Board's motion was allowed. At the same time a motion by International and Local Union 1114 (successor to Local Union 1150) to become a party to the proceeding by intervention was denied. The International and the Local Unions were granted leave, however, to appear as *amicus curiae* in any subsequent proceeding. All parties, including the Unions as *amicus curiae*, have filed briefs and participated in oral argument confined to the question as to the impact, if any, which the Supreme Court decision had upon our decision.

The controversy as it relates to the issue of non-compliance revolves around the "trustees" and "secretaries" of the International Union. Petitioner contends that they are officers of such Union and required under Sec. 9 (h) to file the non-communistic affidavit, while the Board and the Unions assert to the contrary. Notwithstanding that all parties profess to discern support in the Supreme Court decision for their respective positions, all must agree that two questions were decided by the Supreme Court, (1) that an employer may under some circumstances challenge in an unfair labor practice proceeding the determination of the Board that a labor organization is not in compliance with Sec. 9 (h) of the Act, and (2) that the Board's definition of the term "officer" as set forth in Sec. 102.13 (b)(3) of the Board's rules and regulations is a valid definition of that term within the provisions of the Act. The decision

an employer can question the necessity of compliance a reiteration of the Court's previous holding in *L. R. B.* v. *Highland Park Mfg. Co.*, 341 U. S. 322.

There is no dispute as to the facts in the instant situation under the decision of the Supreme Court in the *Coca-a* case there remains for decision the sole question as whether the "trustees" and "secretaries" of the Inter-ional Union were officers. This much is conceded by the ard and the Unions. The Board's regulation, approved the Supreme Court, provides so far as here material, e term 'officer' * * * shall mean any person occupying osition identified as an office in the constitution of the or organization * * *." This brings us to the question to whether "trustees" and "secretaries" occupy positions entified" as an office in the constitution of the Interna-nal Union.

The important provision in International's constitution Article 5, which is as follows:

"Section A. The Officers of the United Electrical, Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon.

"A General Executive Board shall be composed of the General President, General Secretary-Treasurer, Director of Organization and all General Vice-Presidents and District Secretaries who are designated by the respective geographical Districts. Three Trustees and one Alternate shall also be elected.

"Section B. The General Officers and Trustees, with the exception of the Sergeant-at-Arms, shall be nominated and elected by the International Convention. Nominees shall be good standing members of this union for one year or longer.

"Section C. The terms of the General Officers and General Vice-Presidents shall end October 31st, and

> the Trustees and the General Executive Board shall have all records of the convention in order that the business of the Union shall function in an orderly manner from November 1st."

The Board and the Unions contend that in ascertaining the persons "occupying a position identified as an office," only the first paragraph of Section A is relevant, in other words, that we must close our eyes to all other provisions, not only those contained in Article 5 but in other articles of the constitution. With this contention we do not agree. It is true, of course, that "trustees" and "secretaries" are not specifically designated as officers, but it is provided that "trustees" shall be nominated and elected by the International convention, and that "secretaries," in addition to other designated officials, are members of International's Executive Board. The Supreme Court in the *Coca-Cola* case stated (page 269), "'Officer' normally means those who hold defined offices." Obviously this definition does not purport to be exclusive but, even if it did, it is our view that "trustees" and "secretaries" hold an identified office. Certainly, to use the Supreme Court's illustration, they are not "boys in the back room or other agencies of invisible government." The Board's regulation does not require that the position occupied be specifically designated or named as an office but only that it be identified as such, which carries a broader meaning.

The specific requirement contained in Article 5, that the "trustees" be nominated and elected by the International convention at the same time and in the same manner that those designated as General Officers are elected, carries a strong connotation that the "trustees" are to be elected to an office. More than that, by Article 5 "secretaries" the same as other General Officers are specifically designated as members of the Executive Board of the International Union. In our view, the most favorable appraisement which can be made of Article 5 from the standpoint of the Board

and the Unions is that it is capable of raising a doubt as to whether the positions of "trustees" and "secretaries" are "identified as an office." More specifically, the Article as it relates to the issue under discussion is ambiguous.

Such being the situation, we think it proper to resort to other provisions of the constitution for the purpose of ascertaining the official authority or power bestowed upon "secretaries" and "trustees." See *American Communications Assn. et al.* v. *Douds*, 339 U. S. 382, 407-418. Also, we think that the recognition accorded "secretaries" and "trustees" by the International Union is relevant.

Article 9 of the constitution provides:

> "* * * The duties of the Trustees shall be to audit all books and records of the International Office quarterly, or by order of the General Executive Board; to take inventory at least once a year, and safeguard all the properties of the Union and make their report at the convention. * * *"

The "trustees" act as administrators of the procedure for the recall of General Officers of the International Union. This procedure is set forth in Article 11 of its constitution. In the proceedings of the 1951 convention of the International Union, "trustees" were recognized as officers and elected by ballot, as were all other officers. The President of the International Union on the floor of the convention stated that the meeting was open for nominations for "the office of trustee." The International Union evidently regarded Article 5 of its constitution as ambiguous because at its 1952 convention it was amended. The explanation for the amendment, as made by the chairman of the constitution revision committee, was as follows, "The reason for this is that in Article 5 all of the officers are jumbled together and they are picked up again in a series of articles later on, and the attempt is to deal with the general officers in one section and their duties, to deal with the General Executive Board, General Vice-Presidents and their duties,

and thirdly to deal with the Trustees and their duties into three separate items that now contain reference to those provisions. * * *" We agree with the statement, "in Article 5 all of the officers are jumbled together." More than that, this statement appears to be a clear recognition that "trustees" were regarded as officers and that a distinction was made between Gneral Officers and other officers, including "trustees," all referred to in Article 5.

Article 10 of the constitution in great detail sets forth the powers and duties of the General Executive Board. Such powers, as might be expected, relate to every facet of management and control of the International Union as well as its affiliated District Councils and Local Unions. Its power and authority encompass both the policy making and administrative fields. The constitution provides for 27 members of the Executive Board, of whom 12 are District Secretaries. Thus it is evident that "secretaries" as members of this Executive Board are in a position to wield much influence in the formation as well as in the execution of Union policy at its highest level. A "secretary" has the same power in this top policy making group of International as its President, Vice-President or any other official. The powers and duties conferred by the constitution upon "secretaries" and "trustees," together with the character of recognition given them by the International Union, strongly support the conclusion that they under Article 5 of the constitution hold a position "identified as an office."

We are aware, of course, that in the *Coca-Cola* case the employer offered proof as to the duties and functions of a certain person for the purpose of showing that he was an officer of the Union. The Board refused to consider such testimony and for that reason the case was reversed by the Court of Appeals. The Supreme Court sustained the Board's position on this point, referring to the proffered testimony as embodying a "functional test" which it held improper (page 268). We are not here concerned with the performance of duties and functions but with the power of

those asserted to be officers as fixed in the constitution of the International Union, together with the recognition accorded by the International Union itself to those asserted to be officers. It also may be noted that a reading of the opinion of the Supreme Court and that of the Court of Appeals fails to disclose that the alleged officer or the office which he was alleged to hold was named in the Union constitution there under consideration, while here "trustees" and "secretaries" are named. In any event, the situation here is distinguishable from that before the court in the *Coca-Cola* case.

It is, therefore, our view that the decision of the Supreme Court in *Coca-Cola* does not impair the result which we reached in our previous opinion rendered November 10, 1955. That opinion, however, is ordered to be withdrawn and this opinion substituted therefor. We reiterate our previous holding that the "secretaries" and "trustees" of the International Union are officers within the scope and intendment of Sec. 9 (h) of the Act, as well as the Board's regulation. Admittedly, such officers filed no affidavit and the International Union was not in compliance. It follows that the petition to review, set aside and vacate the order under review is allowed, and that the Board's request for its enforcement is denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

Decisions of the National Labor Relations Board

UNITED STATES OF AMERICA

Before The National Labor Relations Board

(Caption—No. 13-CA-1292)

DECISION AND ORDER

(Dated January 28, 1955)

After a charge duly filed by Local 1150 in this case and a complaint issued thereon alleging that the Respondent had committed violations of Section 8 (a) (5) and (1) of the Act, the Respondent filed with the Board a motion to redetermine the compliance status of Local 1150's International Union, (United Electrical, Radio and Machine Workers of America) and for dismissal of the complaint pending against it upon the ground, *inter alia*, that the International's trustees were officers and that the individuals filling these positions had failed to file affidavits required of officers by Section 9(h) of the Act.[1] Whereupon, the Board, on June 24, 1953, issued a Notice to Show Cause, ordering the International to show cause why the Board should not administratively determine that the International was not in full compliance for the reason just stated. The International timely filed an answer to the Notice to Show Cause and the Respondent filed a

[1] The Respondent also raised the same issues of compliance in its answer to the complaint, in which it admits refusing to bargain with the International Union but defends upon the grounds of noncompliance by the Union and its affiliates and also upon the ground that the unit found by the Board in the prior representation proceeding (Case No. 13-RC-2761) is inappropriate.

reply memorandum to the International's answer. Thereafter, on August 6, 1953, the Board issued its Order and Administrative Determination of Compliance Status ordering that, good cause having been shown by the International why the Board should not determine that its trustees were and are officers, Respondent's motion in all respects be denied.

On August 31, 1953, a hearing was held on the merits in this case before Trial Examiner Robert L. Piper. On January 8, 1954, the Trial Examiner issued his Intermediate Report finding that the Respondent had engaged and was engaging in certain unfair labor practices within the meaning of Section 8 (a)(5) and (1) of the Act, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Respondent filed exceptions to the Intermediate Report and a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case, and hereby adopts the findings and conclusions of the Trial Examiner with the following additions:

In its exceptions to the Intermediate Report, the Respondent, *inter alia*,[2] affirmatively alleges that District 11 of the United Electrical, Radio and Machine Workers of America, (the District with which Local 1150 and the UE International are affiliated), is a labor organization not

[2] The Respondent continues to argue in its exceptions that the Board erred in its unit finding in the prior representation proceeding in this matter. As this issue was fully litigated and considered by the Board in the representation proceeding, in the absence of evidence which was newly discovered or unavailable to the Respondent at the time of the representation hearing, it is clear that such issue is not properly the subject of relitigation in the instant proceeding. *Clarostat Manufacturing Company, Inc.*, 107 NLRB No. 156. Accordingly, we find no merit in this exception.

in compliance with the filing requirements of Section 9 of the Act, and that for this reason the complaint should be dismissed. Because this specific contention was not considered in the above-mentioned Board's Order and Administrative Determination of August 6, 1953, the Board on April 12, 1954, issued a Notice to Show Cause why it should not administratively determine that District 11 is a labor organization which should comply with the filing requirements of Section 9 of the Act for Local 1150 and the UE to be in full compliance. Both District 11 and the Respondent filed answers to the Notice to Show Cause. This particular issue has been considered together with a similar issue in another case [3] which also involved a District (District 9) of the United Electrical, Radio and Machine Workers of America, and upon which issue a lengthy hearing was held. In that case, the Board found that District 9 was not a labor organization within the meaning of the Act and for that reason its officers were not required to comply with the filing requirements of Section 9 of the Act in order for affiliated locals and the UE to be in full compliance. We take judicial notice of the fact that the character and function of District 11, here involved, are the same as that of District 9 involved in the *Magnavox* case. Accordingly, for reasons stated in the *Magnavox* case, we find that District 11 is not a labor organization within the meaning of the Act and therefore its officers are not required to comply with the filing requirements of Section 9 of the Act in order for Local 1150 and the U.E. to be in full compliance. Because it appears that both Local 1150 and its affiliate, United Electrical Radio and Machine Workers of America are in compliance with the filing requirements of the Act and that the unit involved is appropriate for purposes of collective bargaining, we find that the Respondent has violated Section 8 (a) (5) and (1) of the Act by its admitted refusal to bargain with the United Electrical Radio and Machine Workers of America. Accordingly, we shall issue our usual 8 (a) (5) (1) order.

[3] *Magnavox Company*, 111 NLRB No. 64.

ORDER

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board orders that the Respondent, Goodman Manufacturing Company, a corporation, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with the United Electrical Radio and Machine Workers of America as the exclusive representative of all the employees in the appropriate unit; and

(b) In any other manner interfering with the efforts of the United Electrical Radio and Machine Workers of America to negotiate for, or to represent, the employees in the appropriate bargaining unit as their exclusive bargaining agent.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon the request, bargain collectively with United Electrical Radio and Machine Workers of America as the exclusive representative of the employees in the appropriate unit.

(b) Post at its plant at Chicago, Illinois, copies of the notice attached hereto and marked Appendix.[4] Copies of said notice, to be furnished by the Regional Director for the Thirteenth Region, shall after being signed by Respondent's representative be posted by Respondent immediately upon receipt thereof and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

[4] In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER."

Respondent to insure that said notices are not altered, defaced or covered by any other material; and

(c) Notify the Regional Director for the Thirteenth Region in writing within ten (10) days from the date of this Order what steps Respondent has taken to comply herewith.

Dated, Washington, D. C., January 28, 1955.

GUY FARMER, Chairman
ABE MURDOCK, Member
IVAR H. PETERSON, Member
PHILIP RAY RODGERS, Member
NATIONAL LABOR RELATIONS BOARD

(Seal)

APPENDIX

NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees that:

> We Will bargain collectively upon request with United Electrical Radio and Machine Workers of America as the exclusive representative of all employees in the bargaining unit described herein with respect to wages, rates of pay, hours and other conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.
>
> The bargaining unit is:
>
> > All production and maintenance employees including group leaders, coal passers, firemen and maintenance men, woodworkers, shellac men, laborers, factory clerical employees, timekeepers,

and order pickers, but excluding pattern makers and apprentices, tracers, expediters, time study men, draftsmen and other technical employees, operating engineers, office clerical employees, watchmen, guards, foremen, assistant foremen, and all other supervisory employees with authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend such action.

We Will Not engage in any act in any manner interfering with the efforts of the aforesaid union to negotiate for or represent the employees in the bargaining unit described above.

GOODMAN MANUFACTURING COMPANY
(Employer)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced or covered by any other material.

UNITED STATES OF AMERICA

Before The National Labor Relations Board

ORDER AND ADMINISTRATIVE DETERMINATION OF COMPLIANCE STATUS

(Dated August 6, 1953)

On or about October 27, 1952, the United Electrical Radio and Machine Workers of America, herein referred to as the Union, filed with the Board an affidavit designating as officers the following: General President, General Secretary, Director of Organization, and General Vice-Presidents (Districts 1-12 inclusive). Non-Communist affidavits were filed with the Board by the incumbents of these offices. The Board thereupon certified the Union as being in compliance with Section 9(h) of the Act.

On March 4, 1953, Goodman Manufacturing Company, herein referred to as Goodman, the Respondent in Case No. 13-CA-1292, filed a motion for the redetermination of the compliance status of the Union and for the dismissal of the complaint pending against it upon the ground, among others, that the Union's Trustees were officers and that the individuals filling these positions had failed to file the affidavits required of officers by Section 9(h). On examination of the sufficiency of the Union's compliance, there was some doubt as to whether the Union had improperly failed to designate its Trustees as officers and to file the necessary non-Communist affidavits for them. Accordingly, on June 24, 1953, the Board issued a Notice to Show Cause, ordering the Union to show cause why the Board should not administratively determine that the Union was not in full compliance for the reason just stated.

The Union's answer, which was timely filed on July 6, 1953, has been carefully considered by the Board. On

July 3, 1953, Goodman moved for leave to file a reply memorandum to the Union's answer,[1] and in fact filed such a memorandum on July 13, 1953. Notwithstanding the Union's opposition to the filing of Goodman's reply, we have considered the argument made by Goodman in its reply memorandum.

Section 102.13 of the Board's Rules and Regulations provides, in part, that the term "officer" for the purpose of Section 9(h) of the Act "shall mean any person occupying a position identified as an office in the constitution of the labor organization . . ."

The Union's 1951-1952 constitution, upon which Goodman primarily relies, contained the following provision:

ARTICLE 5

Section A. The Officers of the United Electrical, Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon.

A General Executive Board shall be composed of the General President, General Secretary-Treasurer, Director of Organization and all General Vice-Presidents and District Secretaries who are designated by the respective geographical Districts. Three Trustees and one alternate shall also be elected.

The Union contends, inter alia, that its constitutions clearly differentiate between Trustees and officers. We

[1] In its motion, Goodman further seeks reconsideration of its contention that the Union's District Secretaries are officers of the International Union. We have, in a prior decision, (Sunbeam Corp., 98 NLRB 525) considered and rejected the same contention. Goodman has presented no evidence in this regard to cause us to reverse our prior determination.

agree. We are of the opinion that only the officials referred to in the first sentence of the above Article 5, Section A are officers. This conclusion is buttressed by other provisions in the constitution. Thus, Article 5, Section B of that constitution stated that "The General Officers and Trustees . . . shall be nominated and elected by the International Convention." Furthermore, Article 9 provides for a method of selecting Trustees different from that employed in the selection of officers, and Article 11 provides for Trustees to administer the established procedure for recalling officers. Under these circumstances, we find that the Trustees were not officers of the Union under the 1951-1952 constitution and that, as no substantive changes were effected in the current constitution, the Trustees, a fortiori, are not officers of the Union under the 1952-1953 constitution. In so finding, we regard the Board's decision in Compliance Status of Local No. 1150, UE,[2] relied upon by Goodman, as inapposite.

Accordingly, the Trustees' failure to file in no way effects the Union's compliance status.

It Is Hereby Ordered that, good cause having been shown by the United Electrical, Radio and Machine Workers of America why the Board should not determine that its Trustees were and are officers, Goodman Manufacturing Company's motion in all respects be, and it hereby is, denied.

It Is Further Administratively Determined that the United Electrical, Radio and Machine Workers of America is, and has been, in compliance with Section 9(h) of the Act.

Dated, Washington, D. C., August 6, 1953.

By direction of the Board:

FRANK M. KLEILER
Executive Secretary

---

[2] 96 NLRB 1029.

APPENDIX D

Statutes and Regulations Involved

1. Section 9(h) of the National Labor Relations Act:

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

2. Sections 5(a) and 5(b) of the Administrative Procedures Act:

NOTICE OF HEARING AND ISSUES

(a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

3. Section 102.13(b) of the Rules and Regulations of the National Labor Relations Board:

(b) For the purpose of the rules and regulations in this part, compliance with section 9(h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:

(1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incumbent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any

organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" is used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that where the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9(h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9(h) of the act.

APPENDIX E

Relevant Provisions of the Union Constitution

ARTICLE 5

Section A. The Officers of the United Electrical Radio and Machine Workers of America (UE) shall be General President, General Secretary-Treasurer, Director of Organization, and a General Vice-President for each geographical district so agreed upon.

A General Executive Board shall be composed of the General President, General Secretary-Treasurer, Director of Organization and all General Vice-Presidents and District Secretaries who are designated by the respective geographical Districts. Three Trustees and one Alternate shall also be elected.

Section B. The General Officers and Trustees, with the exception of the Sergeant-at-Arms, shall be nominated and elected by the International Convention. Nominees shall be good standing members of this union for one year or longer.

Section C. The terms of the General Officers and General Vice-Presidents shall end October 31st, and the Trustees and the General Executive Board shall have all records of the convention in order that the business of the Union shall function in an orderly manner from November 1st.

ARTICLE 9

Section A. The four nominees for Trustees receiving the highest number of votes in their consecutive order shall be declared as three Trustees and Alternate respectively.

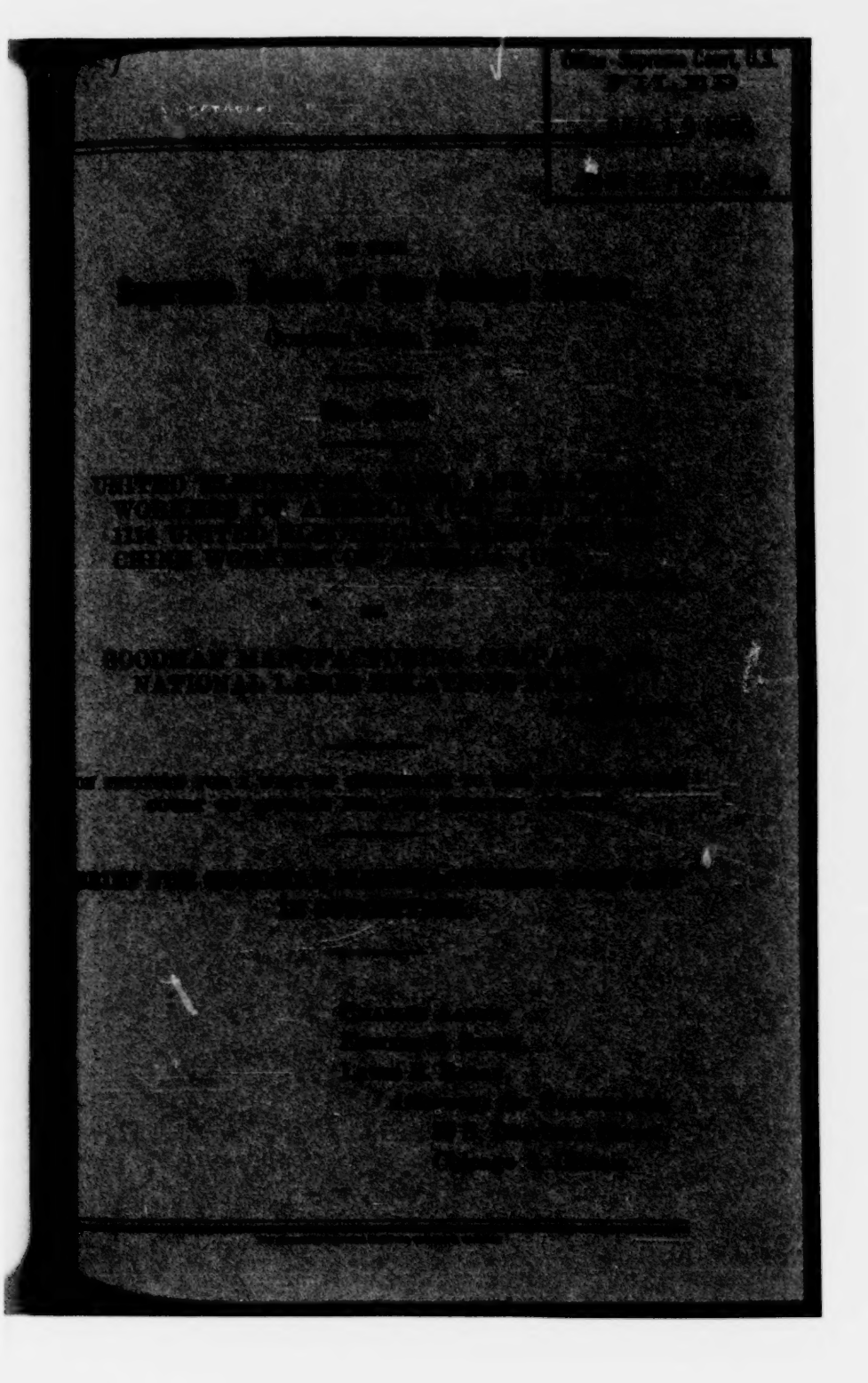
Section B. The duties of the Trustees shall be to audit all books and records of the International Office quarterly, or by order of the General Executive Board; to take inventory at least once a year, and safeguard all the properties of the Union and make their report at the convention. The trustees shall elect one of their number who will make the report at the convention in the name of the trustees. All trustees to receive copies of the convention minutes, so that financial statements given at the convention agree with copy that each trustee shall receive at the time the yearly audit is made.

* * * * * *

ARTICLE 11

Section A. Any local in good standing may initiate a petition for the recall of any General Officer by the following procedure. The local initiating the petition must first receive official endorsement from the other locals comprising twenty-five (25%) per cent of the total membership involving not less than three (3) locals, as determined by the paid per capita on the average of the three previous months, before submitting petition to the Trustees through the International Office. The Trustees shall then order the petition to be sent to every local in good standing, which shall take an aye and nay vote upon sustaining the recall. All local action pertaining to initiation of petition for recall and all local action on sustaining of recall shall be acted upon at a special meeting. Locals shall return the officially sealed result to the Trustees within forty-one (41) days of receiving same. The Trustees shall then announce result of vote to locals.

Section B. The local initiating petition must first receive official endorsement from the other locals comprising twenty-five (25%) per cent of the total membership within the officially prescribed geographical districts (as determined by paid per capita of the average of the three (3) months previous) before submitting petition to the Trustees through the International Office. The Trustees shall then order petition to be sent to every local in good standing, which shall take an aye and nay vote upon sustaining the recall. All local action pertaining to initiation of petition for recall and all local action on sustaining of recall shall be acted upon at a special meeting. Locals shall return the officially sealed result to the Trustees within forty-one (41) days of receipt of same. The Trustees shall announce the result to the locals.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 233.

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE) AND LOCAL 1114 UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE),
Petitioners,

vs.

GOODMAN MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR GOODMAN MANUFACTURING COMPANY IN OPPOSITION.

OPINIONS BELOW.

The first opinion of the court below (Pet., App. B, p. 22) is reported at 227 F. 2d 465; its second opinion (Pet., App. B, p. 30) is reported at 234 F. 2d 775. Neither the order of the court below denying petitioners' motion for leave to intervene in the review proceedings (Pet., App. A, p. 21) nor the order of the court below denying petitioners' motion for leave to intervene and vacate the judgment

of the court below (Pet., App. A, p. 19) is reported. The order and administrative determination of compliance status (Pet., App. C, p. 44; R. 183-185), issued August 6, 1953, is not reported. The findings of fact, conclusions of law and order of the National Labor Relations Board (hereinafter referred to as the "Board") (Pet., App. C, pp. 38-43; R. 276-280, 218-225) are reported at 111 NLRB 369 (1955).

JURISDICTION.

The judgment of the court below (Pet., App. A, p. 20) was entered on June 15, 1956. The order of the court below denying petitioners' motion for leave to intervene (Pet., App. A, p. 19) was entered on April 6, 1956. The Petition for Writ of Certiorari was filed on July 5, 1956. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Sections 10(e) and 10(f) of the National Labor Relations Act, as amended (hereinafter referred to as "NLRA").

QUESTIONS PRESENTED.

1. Whether the court below erred in denying petitioners' application for leave to intervene for the purpose of filing a motion to vacate the judgment of the court below in a case where they had not sought to intervene prior to judgment.

*2. Whether Section 9(h) of the NLRA may constitutionally be applied to require all officials of a union holding positions identified as offices in its constitution to file non-Communist affidavits as a condition precedent to the union's use of the processes of the Board.

*3. Whether the court below erred in holding that the Board must construe the entire constitution of a union to determine which officials hold positions "identified as

offices" within the meaning of Section 102.13(b)(3) of the Board's Rules and Regulations.

*4. Whether the court below erred in failing to remand this cause to the Board for hearing to take additional evidence as to whether certain officials of the union were "officers" within the meaning of Section 9(h) of the NLRA, where uncontradicted documentary evidence in the record enables the court to make such determination as a matter of law.

CONSTITUTIONAL PROVISIONS, STATUTE AND REGULATIONS INVOLVED.

The pertinent provisions of the Constitution of the United States are set forth in the Petition, p. 3, and the applicable provisions of the NLRA (61 Stat. 136, 29 U. S. C. 151 *et seq.*) and of the Board's Rules and Regulations are set forth in Appendix D to the Petition (p. 47).

STATEMENT.

This respondent, Goodman Manufacturing Company, accepts the statement of the case set forth on pages 3 through 6 of the Brief for the Board in Opposition.

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* Questions 2 through 4 are addressed to the importance of the decision below. The respondent supports the position of the Board that these questions are properly before this Court only if the court below erred in denying petitioners' motion for leave to intervene. Questions 2 through 4 are discussed herein for the sole purpose of assisting the Court in disposing of all matters arising out of the Petition with as little delay as practicable if it determines that the Court below erred in denying petitioners' application for leave to intervene.

ARGUMENT.

I.

Petitioners' Motion for Leave to Intervene in the Proceedings Before It Was Properly Denied by the Court of Appeals.

The petitioners did not attempt to intervene in the proceedings below until after the original judgment was entered on November 10, 1955. Thereafter, within the time permitted for the filing of a motion for rehearing it filed a motion for leave to intervene and to file a motion for rehearing, even though it was acquainted with the progress of the proceedings at all times prior to that date (Affidavit of Edward S. Stern, Objections to Motion for Leave to Intervene, p. 8).* Subsequently, after this Court had decided *National Labor Relations Board* v. *Coca Cola Bottling Co. of Louisville*, 350 U. S. 264 (1956), the Board filed a motion to vacate the original judgment of the court below and to reinstate the case for further consideration. The petitioners moved for leave to intervene and to support the Board's motion. The Board and this respondent opposed such intervention. The motion was denied but the petitioners were given leave to appear as *amicus curiae*, to file a brief and to participate in the oral argument (Pet., App. A, p. 19) which they subsequently did.

As is fully argued in the Board's Brief in Opposition filed herein, Section 10(f) of the NLRA does not give a party which is not aggrieved by an order of the Board a right to participate in proceedings before a Court of Appeals (Board Brief, pp. 6-9). The Board, in seeking to

* The denial of this first motion for leave to intervene is not at issue in these proceedings.

enforce an order or in defending an order from attack by an aggrieved party, is acting in a public capacity (*National Licorice Co.* v. *N. L. R. B.*, 309 U. S. 350, 362 (1939)). Orders of the Board in unfair labor practice proceedings under Section 8 of the NLRA do not give either employers or unions private rights which may be enforced by them in the Courts of Appeals (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 270 (1939)). Respondent adopts and supports the argument of the Board contained on pages 6 through 9 of its Brief in the same manner as though respondent had included said argument herein in full.

All the matters set forth below in this section I of the respondent's argument in opposition to the Petition are presented to the Court as matters supplemental to the argument set forth by the Board in its Brief.

The granting of a petition of a third party for leave to intervene in litigation is entirely discretionary with a court when a statute does not grant the party the right to intervene as of right, and a reviewing court will not review the decision of the lower court unless there has been an abuse of discretion. Contrary to the statement of the petitioners (Pet., pp. 16-17), there is no conflict between the decisions of the various Courts of Appeals on the question of whether a non-aggrieved party may intervene in cases before them arising out of petitions for review or petitions for enforcement of Board orders. The Court of Appeals for the Seventh Circuit has exercised its discretion in favor of intervention by both employers and unions in such recent cases as *Kovach* v. *N. L. R. B.*, 229 F. 2d 138 (CA 7, 1956); *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO* v. *N. L. R. B.*, 231 F. 2d 237 (CA 7, 1956); *Chauffeurs, Teamsters and Helpers General Local #200, AFL* v. *N. L. R. B.*, 233 F. 2d 233 (CA 7, 1956). On the other hand

the Court of Appeals for the Seventh Circuit is not the only Court of Appeals which has denied intervention. One of the leading cases on the point is *Haleston Drug Stores, Inc.* v. *N. L. R. B.*, 190 F. 2d 1022 (CA 9, 1950). In the *Haleston* case, the Board dismissed a charge filed by Haleston against certain labor unions. Pursuant to Section 10(f) of the NLRA, Haleston filed a petition for review of the dismissal and the unions named in the charge moved to intervene as defendants in the appeal. The court refused to allow intervention even though both the petitioner and the Board had waived objections thereto.

This Court should not grant certiorari unless it feels that the court below clearly abused its discretion in denying petitioners' motion for leave to intervene.

There is no question but that the rights of the local union, one of the petitioners, as the charging party in these proceedings, were fully and properly represented (*New York* v. *New York Telephone Company*, 261 U. S. 312, 316 (1922)) by the Board before the court below. The Board, in addition to answering the petition of this respondent to review and set aside its order, requested enforcement of the order, filed a brief of forty-two (42) pages in support thereof and subsequently argued the issues orally before the Court of Appeals. Following the opinion of this Court in the *Coca Cola* case, the Board moved to vacate the original judgment entered by the court below and upon vacation of that judgment (Pet., App. A, p. 19), filed a brief and argued orally for a second time in support of its original order. It should be noted that at no time prior to the entry of the original judgment by the Court of Appeals did the petitioner seek to intervene. It is obvious that up until that time it was satisfied that its interests were adequately represented. It attempted to intervene only after the Court of Appeals had entered a judg-

ment denying enforcement of the Board's order, which had been in its favor.

In *Caldwell* v. *Guardian Trust Co.*, 26 F. 2d 218 (CCA 8, 1928), a third party attempted to move to set aside the judgment theretofore entered and to interpose an answer setting up alleged defenses to the original complaint. The petition was filed after judgment had been entered. The Circuit Court of Appeals held that intervention should be denied even though the person may have had an interest in the property which was the subject of the suit and might have intervened prior to judgment. The court stated (at p. 222):

> "But the right of intervention is one which must be exercised promptly. The application may properly be denied, when not made until after judgment has been rendered. 11 Encyc. Pl. & Pr. 503; *Owens* v. *Colgan*, 97 Cal. 454, 32 P. 519; *Laugenour* v. *Shanklin*, 57 Cal. 70; *Henry, Lee & Co.* v. *Cass Co., etc., Co.*, 42 Iowa, 33; *Leon First Nat. Bank* v. *Gill & Co.*, 50 Iowa, 425; *Henderson* v. *Farmers', etc. Bank*, 199 Iowa, 1156, 200 N. W. 581; *Meadows* v. *Goff*, 90 Ky. 540, 14 S. W. 535; *Hicklin* v. *Neb. City Nat. Bank*, 8 Neb. 463, 467, 1 N. W. 135; *Porter* v. *Knapp*, 37 S. D. 279, 157 N. W. 988; *Youngberg* v. *Youngberg*, 44 S. D. 1, 181 N. W. 835. See *State* v. *Farmers' State Bank*, 103 Neb. 194, 170 N. W. 901.
>
> "Even in equity it is unusual to grant leave to intervene after final decree. 21 C. J. § 346, p. 345; *Engdahl* v. *Laverty*, 110 Neb. 672, 194 N. W. 862."

Thus, the Court should review the order denying the petitioners leave to intervene only if it believes that the court below abused its discretion in denying the motion made after judgment. Two important factors which the Court should consider in determining whether the court below did abuse its discretion are (1) the adequate representation by the Board of the petitioners' interest in the

proceedings below, and (2) the fact that the petitioners did not seek to intervene at any time prior to the judgment indicating clearly that it was the judgment and not the quality of their representation by the Board with which they were dissatisfied.

II.

Neither Congress Nor the Board Have Attempted to Classify Those Officers Who Must Comply With Section 9(h) of the Act.

The petitioners contend that the decision below results in a violation of the First Amendment to the Constitution of the United States in that it denies political freedom to members of unions to choose officers and restricts the freedom of union officers to choose their political beliefs. They contend that *American Communications Association* v. *Douds,* 339 U. S. 382 (1949), which case held Section 9(h) of the NLRA constitutional, did so only insofar as that section applies to officers of unions who have the power to call strikes (Pet., pp. 8-9). They argue that because the Trustees' duties lie primarily in safeguarding union finances and supervising the procedure for the recall of officers, they should not be required to comply with Section 9(h). In other words, the petitioners imply that the *Douds* case compels the Board to classify the officers of a union according to their ability to call political strikes in determining which officers should comply with Section 9(h) of the Act. There is no indication in the Congressional Record (93 Cong. Rec. 3577, 5095, 6438, 6537-38, 6602, 6604, 6612, 6656, 6664, 7002, 7503) or in the reports of the committees of Congress (H. Rep. No. 245, 80th Cong., 1st Sess., pp. 38-9, 89; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 49) which considered the Taft-Hartley Amendments to the NLRA, that Congress ever intended to so classify officers of a union. Certainly in the *Douds* case

neither Chief Justice Vinson, who wrote the majority opinion, nor Justices Frankfurter or Jackson, who wrote concurring opinions, attempted to make the classification. It is true that the majority opinion contains a considerable number of references to the power of officers of a union who may call political strikes (Pet., p. 9). It is also true, and the petitioners do not mention this fact in the Petition, that the opinions of this Court in the *Douds* case refer to other reasons why the Congress may require officers of unions to file non-Communist affidavits. For instance, Chief Justice Vinson stated (at p. 392):

> "* * * Political affiliations of the kind here involved no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by § 9(h) would be subject to 'tempting opportunities' to commit acts deemed harmful to the national economy. In this respect § 9(h) is not unlike a host of other statutes which prohibit specified groups of persons from *holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office.*" (Emphasis ours.)

and at p. 402, Chief Justice Vinson stated:

> "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,' *the public interest in the good faith exercise of that power is very great.*" (Emphasis ours.)

It is significant that Justice Frankfurter in his concurring opinion did not even mention the power to call political strikes as an important reason for the regulation

of union officers under Section 9 (h). He stated that one of the reasons for such regulation is "to keep Communists out of controlling positions in labor unions as a condition to utilize the opportunities afforded by" the NLRA (p. 416). At p. 418, he set forth another reason:

> "Congress was concerned with what it justifiably deemed to be the disorganizing purposes of Communists who hold *positions of official power in labor unions,* or, at the least, what it might well deem their lack of disinterested devotion to the basic tenets of the American trade union movement because of a higher loyalty to a potentially conflicting cause. * * *" (Emphasis ours.)

Although it is unquestionably true that one reason why Congress adopted Section 9(h) was to require non-Communist affidavits from those officers who had the power to call political strikes, this is only one reason; and it is also true that Congress was at the same time deeply concerned with the fiduciary nature of the positions of officers of unions and was particularly concerned with their relationship to the rank and file members of the unions. Section 9(g) of the Act requires unions to file financial information with the Secretary of Labor and to distribute such information to its members annually. In holding this section constitutional, a three-judge court sitting in the District Court for the District of Columbia held that where a private citizen engages in union activities "rights which are guaranteed by the Constitution to a private citizen do not prevent the government from determining their fitness to be fiduciaries or from restricting their actions as such." (*National Maritime Union of America* v. *Herzog,* 78 Fed. Supp. 146, 173 (D. C., 1948), aff'd., 334 U. S. 854 (1948).)

The petitioners admit that the Trustees are primarily concerned with the safekeeping of union finances (Pet., p.

9). They, therefore, are concerned with the making of financial reports which are issued to the members of the union. Hence there would seem to be no question that, being fiduciaries and subject to government regulation in the public interest, they could be required constitutionally to file non-Communist affidavits. It is reasonable to assume that Communists, if in charge of safekeeping of union finances, might well, for their own ends, prepare misleading reports, thus deceiving the rank and file members of the union and the Secretary of Labor, who might never learn the actual state of the union finances, if it served the Communists' own ends to mislead them.

Therefore, even if the Court believes that petitioners should be permitted to intervene below, it nevertheless must agree with the Court of Appeals decision holding that the *Douds* case requires all officers of a union to comply with Section 9(h) of the NLRA. It is significant that the petitioners do not argue that under the *Douds* case District Secretaries of the International Union should be excluded from the class of officers required to file affidavits. They attempt to find another reason why the Court of Appeals decision as to the District Secretaries is erroneous (See section IV below), since it could not argue on any ground whatsoever that all members of the General Executive Board of the International Union, of which board the District Secretaries are members (Pet., App. E, p. 49), do not have such power and control of union activities that even under their own limited interpretation of the *Douds* case they may be required to file non-Communist affidavits in accordance with the provisions of Section 9(h).

III.

The Court of Appeals Correctly Determined That the Trustees and District Secretaries Are Officers Within the Meaning of Section 9(h) of the National Labor Relations Act and Section 102.13(b)(3) of the Board's Rules and Regulations.

Section 102.13(b)(3) of the Board's Rules and Regulations provides that "the term 'officer' shall mean any person occupying a position identified as an office in the Constitution of the labor organization." In interpreting this regulation and determining that the International Union did not comply with Section 9(h) of the NLRA, the court below applied the customary rule of construction that the meaning of an instrument cannot be determined merely by reference to one isolated clause, but must be determined by reading the document as a whole and its several provisions in relation to one another. When the document is ambiguous, resort must be had to such other evidence as clarifies the intent of the draftsmen or the interpretation given the document by those primarily concerned. Thus, the court's holding that the Trustees and District Secretaries are officers within the meaning of Section 9(h) was based not only on the list of officers in the first paragraph of Article 5, Section A of the International Union constitution (Pet. App. E, p. 49), but also on the other provisions of the constitution which enumerate the union's officials, their duties and their manner of selection (Pet., App. B, pp. 33-35). In discussing the status of the Trustees, the court below also took into account various statements of union officials contained in other documents, for the purpose of further clarifying the ambiguities it found inherent in the constitution (Pet., App. B, pp. 35-36).

At no time did the court below purport to adopt the purely "functional test" rejected by this Court in *N. L. R. B.*

v. *Coca Cola Bottling Co. of Louisville,* 350 U. S. 264 (1956), *i. e.* that a union's officers may be determined solely by examining their activities on behalf of the union and without specific regard to the provisions of its constitution. On the contrary, the International Union's constitution was the basis for both decisions of the court below, and on reconsidering its original decision, it ordered the filing of additional briefs and the presentation of additional oral argument on the question of the impact of the *Coca Cola* decision on its first decision in this case (Pet., App. B., pp. 22-29). Further, the court below did not deny the validity of Section 102.13 (b)(3) of the Board's Rules and Regulations, as had the lower court in the *Coca Cola* case (219 F. 2d 441 (CA 6, 1955)). Rather, the court below differed with the Board only on the result reached by applying that regulation to the International Union's constitution using the customary rules of documentary construction. Actually it is petitioners who now by their argument in the Petition violate the rule of the *Coca Cola* case by attempting to employ the "functional test."

The consequence of the decision of the court below is simply that in applying Section 102.13(b)(3) of its Rules and Regulations the Board must now read the whole of each union constitution and, where an ambiguity is present take note of such other facts as may clarify the ambiguity. Apparently, the Board is willing to abide by the decision of the Court of Appeals for it has decided not to request the Solicitor General to file a petition for certiorari on its behalf (Board Brief, p. 6). This should be an adequate answer to the arguments of the petitioners (Pet., pp. 10-14) which relate to the administrative significance of the case. Clearly, in determining whether to

grant certiorari in this case, this Court should accord substantial weight to the decision of the agency primarily charged with the administration of the NLRA not to petition for certiorari itself. That agency's request that this petition for certiorari be denied should be persuasive on the Court.

IV.

Petitioners Were Not Denied Due Process of Law by Reason of the Failure of the Court of Appeals to Remand the Case to the Board for the Purpose of Taking Evidence Relative to the District Secretaries.

In the proceedings before the Board this respondent on March 4, 1953, filed a motion to re-determine compliance status and to dismiss complaint (R. 112-129). This motion alleged in substance that the failure of Trustees and District Secretaries to file non-Communist affidavits was fatal to the jurisdiction of the Board. The Board's notice to show cause, dated June 24, 1953, made no reference to the District Secretaries, but only to the Trustees, because, as is indicated in a footnote to the Board's order of August 6, 1953 (R. 183) denying the motion, the Board had previously determined in *Sunbeam Corp.*, 98 NLRB 525 (1952), that the District Secretaries are not officers of the International Union. Hence, the petitioners won a complete victory before the Board on the issue of the compliance of the District Secretaries of the International Union by virtue of an investigation of the secretaries' duties in an earlier proceeding. The petitioner now urges (Pet., pp. 9-11) that it was denied due process of law because the District Secretaries were found to be "officers" without a hearing having been held on the issue before the Board. The petitioners' phraseology has obscured its legal argument, which apparently is that the Court of Appeals

should have remanded the case to the Board for the taking of evidence on the duties of the District Secretaries and "the whole treatment of those positions in the Union structure and history * * *" (Pet., p. 10).

Undoubtedly, the court below had the inherent power to remand the case for additional findings of fact (*Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373 (1939)), but it was not necessary that it do so (*N. L. R. B.* v. *National Motor Bearing Company*, 105 F. 2d 652 (CCA 9, 1939)). This is true, not only because of the commonly accepted rule that a Court of Appeals need not remand for findings of fact where all the necessary facts can be determined from wholly documentary evidence in the record (*Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (1923); *McComb* v. *Utica Knitting Company*, 164 F. 2d 670 (CCA 2, 1947)), but particularly because the rule announced by this Court in the *Coca Cola* case and followed by the court below is one under which the question of the necessity of compliance by District Secretaries can be determined by reference solely to the union constitution. This document clearly identifies the District Secretaries as members of the General Executive Board (Article 5, Section A, Pet. App. E, p. 49) and gives that Board the power to control union activities (Art. 10, R. 146-149). No remand for the making of additional findings of fact was required because the constitution alone clearly set forth the nature of the duties of the District Secretaries.

In the *Curtis Publishing Company* case, this Court reversed a decision of the Federal Trade Commission which had held the respondent there in violation of Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act. No remand for additional findings was deemed necessary, because the Court had before it the contract which had formed the basis for the Commission's ruling.

The Court stated (at p. 580):

> "If there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn, the matter may be and ordinarily, we think, should be, remanded to the commission,—the primary fact-finding body,—with direction to make additional findings; but if, from all the circumstances, it clearly appears that, in the interest of justice, the controversy should be decided without further delay, the court has full power under the statute so to do."

It should be noted that provisions of Section 10(e) of the NLRA dealing with the reviewing power of the Court of Appeals follow closely the language of Section 5 of the Federal Trade Commission Act, under which the *Curtis Publishing Co.* case was decided.* Again, the court below in the instant case has followed a wholly conventional rule and has raised no issue which this Court need review. This rule was stated by it in a case not arising under the NLRA as follows (*Smith* v. *Dravo Corp.*, 208 F. 2d 388, 391 (CA 7, 1953)):

> "* * * Ordinarily, as to issues upon which no findings have been made, the court will reverse with directions to make findings and conclusions, but in equity, where the record is complete or the evidence uncontradicted or entirely documentary, the appellate court is bound to decide the case, so far as it is in

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* Section 5 of the Federal Trade Commission Act provided in part as follows (at the time of the decision, 260 U. S. 568 at p. 573n):

> "* * * the court * * * shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission * * *."

Section 10(e) of the National Labor Relations Act, 29 U. S. C. § 160(e), provides in part as follows:

> "* * * the court * * * shall have power * * * to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board * * *."

> condition to be decided, and direct such a decree as under all circumstances may be proper. * * *"

Under *Ford Motor Co.* v. *N. L. R. B.*, 305 U. S. 364, 373 (1939), the reviewing court has equity powers in reviewing Board decisions (305 U. S. at p. 373).

The petitioners contend that they have been prejudiced by their lack of opportunity to introduce evidence of the activities of the District Secretaries, wholly ignoring the fact that there is no need, as a practical matter, to go beyond the provisions of the constitution to determine that the District Secretaries are officers. This contention is somewhat baffling in the light of petitioners' argument that no evidence is relevant except the initial listing of officers in the first paragraph of Article 5, Section A, of the constitution of the International Union (Pet., App. E, p. 49). The evidence which the petitioners have professed a desire to introduce would be relevant if the Court of Appeals in the instant case had chosen to follow the "functional test" rejected by this Court in the *Coca Cola* case or if it had determined that there was some ambiguity not clarified in the record as to whether secretaries are "officers." The provisions of the International Union's constitution on this point are clear and unequivocal. Therefore, a further hearing before the Board could serve no reasonable purpose.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 19, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 233

UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), AND LOCAL 1114 UNITED ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), *Petitioners*

v.

GOODMAN MANUFACTURING COMPANY AND NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The first opinion of the court below (Pet. App. B) is reported at 227 F. 2d 465; its second opinion (Pet. App. B) is not yet officially reported. The order of the court below denying petitioners' motion for leave to intervene in the enforcement proceeding (Pet. App.

A, p. 19) is not reported. The findings of fact, conclusions of law and order of the Board (Pet. App. C, R. 276-280, 218-224) are reported at 111 NLRB 369.

JURISDICTION

The judgment of the court below (Pet. App. A, p. 20) was entered on June 15, 1956. The order of the court below denying petitioners' motion for leave to intervene (Pet. App. A, p. 19) was entered on April 6, 1956. The petition for a writ of certiorari was filed on July 5, 1956. Jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the court below erred in denying petitioners' application for leave to intervene for the purpose of filing a motion to vacate the judgment of the court below.[1]

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) and the Board's Rules and Regulations are set forth in Appendix D to the petition.

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[1] Petitioners' questions Nos. 1, 2 and 3, which are addressed to the validity of the decision below on the merits, are properly before this Court on this petition only if the court below erred in denying petitioners' application for leave to intervene. Since, as we show in the Argument, *infra*, the denial of the application was clearly proper, we do not believe it necessary to go into these questions in this brief.

STATEMENT

As set forth in the petition, this case arises out of an unfair labor practice proceeding conducted before the National Labor Relations Board pursuant to Section 10 of the National Labor Relations Act. Upon charges duly filed and served, the Board's General Counsel issued a complaint alleging that Goodman Manufacturing Company (hereinafter called the Company) had refused to bargain with petitioner International, the certified bargaining representative of the Company's employees, in violation of Section 8 (a) (5) of the Act (R. 221; 106-112, 196-197).[2] A hearing on the complaint followed at which petitioners were represented by counsel (R. 218; 186). Before the Board, the Company defended its refusal to bargain on the ground, *inter alia*, that the representation proceedings which culminated in the certification of the International were invalid because the International was not in compliance with the filing requirements of Section 9 (h) of the Act at that time. This defense was grounded on the claim that the Trustees and District Secretaries of the International were officers within the meaning of Section 9 (h) but had not filed the required non-Communist affidavits (R. 221-222; 112-132, 186-210).

Thereafter the Board instituted a separate administrative proceeding to determine the International's compliance status (R. 221, 276; 133-134). In connection therewith the Board issued and served on all

[2] The charges were filed by Local 1150, an affiliate of the International (R. 106). Petitioner Local 1114 is the successor to Local 1150.

parties a Notice to Show Cause directing the International to show cause why the Trustees were not officers and why it should not be administratively determined that the International was not in compliance with Section 9 (h) because of their failure to file non-Communist affidavits (*ibid.*). Having already determined in a prior administrative proceeding that the District Secretaries were not officers of the International (*Sunbeam Corp.*, 98 NLRB 525), the Board did not require the Union to show cause with respect to them.

After considering the International's answer to the Notice to Show Cause together with the Company's reply thereto (R. 174-181), the Board, on August 6, 1953, issued an "Order and Administrative Determination of Compliance Status" in which it found that, under the test employed by the Board for determining the "officers" subject to the filing requirements of Section 9 (h), the Trustees and District Secretaries were not officers within the purview of that Section and that the International was in full compliance (R. 221; 133-185). Accordingly, the Board found that in refusing to bargain with the Union the Company violated Section 8 (a) (5) of the Act (R. 277-278, 220-222).

Upon the Company's petition for review and the Board's cross-petition for enforcement of the remedial order, the court below, without passing on the merits of the Board's unfair labor practice findings, set aside the Board's order (Pet. App. B, pp. 22-29). In its opinion issued November 10, 1955, the court, disapproving of the test employed by the Board for

determining the persons subject to the non-Communist affidavit filing requirements, held that the Trustees and District Secretaries were "officers" within the scope of Section 9 (h) and, therefore, that the International was not in compliance with Section 9 (h) of the Act (*ibid.*).

Thereafter, on or about November 28, 1955, petitioners filed a motion with the court below requesting leave to intervene for the purpose of submitting a petition for rehearing. On December 19, 1955, the court below denied the motion (Pet. App. A, p. 21).

Following the decision of this Court on February 27, 1956, in *National Labor Relations Board* v. *Coca-Cola Bottling Co. of Louisville, Inc.*, 350 U.S. 264, upholding the test applied by the Board for determining the persons subject to the filing requirements of Section 9(h) of the Act, the Board, on or about March 2, 1956, filed a motion with the court below to vacate its prior judgment in the instant case and to restore the case to the docket for further proceedings. Petitioners, on March 8, 1956, again moved to intervene, this time in support of the Board's motion. The Board opposed the motion to intervene. On April 6, 1956, the court below issued an order vacating its prior judgment and setting the case on the docket for further consideration (Pet. App. A, p. 19). At the same time the court below denied the Union's motion to intervene but "without prejudice to its right to appear as *amicus curiae,* file brief and participate in any oral argument" (*ibid.*). Thereafter petitioners filed a brief *amicus curiae* and participated in the oral argument.

In its second decision handed down June 15, 1956, the court below concluded that this Court's *Coca-Cola* decision did not "impair the result" reached by it in its earlier November 1955 opinion and then reaffirmed its previous holding that the International was not in compliance with Section 9(h) of the Act (Pet. App. B, pp. 30-37). The court below found that both the Trustees and the District Secretaries were "officers" under the Board's own test as viewed and approved by this Court in the *Coca-Cola* case. Accordingly, the court below held that the failure of these individuals to file the non-Communist affidavits vitiated the proceedings before the Board, and the court again denied enforcement of the Board's order. The Board has determined not to request the Solicitor General to file a petition for certiorari.

ARGUMENT

Petitioners' standing to seek review of the decision below on the merits turns on whether they were parties, or at least intervenors, in the court proceeding below. 28 U.S.C. Sec. 1254. See *International Union* v. *Eagle-Picher Co.*, 325 U.S. 335, 338-339. Although petitioners filed the charges initiating these proceedings, they were not parties in fact or in name, "the controversy * * * [having been] between the Federal government on one hand, represented by the Board, and the respondent-employer on the other hand." *National Labor Relations Board* v. *General Motors*

Corp., 116 F. 2d 306, 312 (C.A. 7). A charge is necessary to set Board proceedings in motion, but "the person or group making the charges does not become the actor in the proceeding." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265. The proceeding "is not for the adjudication of private rights * * *. The Board acts in a public capacity to give effect to the declared public policy of the Act." *National Licorice Co.* v. *National Labor Relations Board*, 309 U.S. 350, 362. Moreover, after the Board order has issued, "the court has no jurisdiction to enforce the order at the suit of any private person or group of persons." *Amalgamated Utility Workers, supra*, at p. 272. This is because it is "the Board's order on behalf of the public that the court enforces * * * The Board seeks enforcement as a public agent, not to give effect to a 'private administrative remedy'." *Id.* at p. 269. Accordingly, unless the court below improperly denied the Union's motion to leave to intervene, the Union is without standing to seek review of the decision below on the merits.[3]

It is clear that unless a statute provides otherwise, petitions of third parties to intervene in pending litigation are generally left to the discretion of the

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[3] The situation here, where a charging party seeks to intervene to support a Board determination, is to be distinguished from the situation where a charging party or other person adversely affected by a Board order seeks to contest and review a Board order. In such cases the charging party has standing to obtain review as a "person aggrieved by a final order of the Board * * * denying in whole or in part the relief sought." Section 10(f) of the Act; *Amalgamated Utility Workers* v. *Consolidated Edison*, 309 U.S. 261, 266.

court of first instance. *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U.S 502, 506. The National Labor Relations Act does not confer upon charging parties the right to intervene in Board proceedings. The considerations which underlie the proposition that a charging party is not a party to Board enforcement proceedings also lead to the conclusion that a charging party has no standing to intervene in such proceedings as a matter of right for purposes of supporting a Board order, as here. As stated in *Aluminum Ore Co.* v. *National Labor Relations Board,* 131 F. 2d 485, 488 (C.A. 7):

> The union has asked leave to intervene. This proceeding is in the public interest, prosecuted by an authorized agency of the Government, in furtherance of an express policy and intent upon the part of Congress to establish, in behalf of the national public, a standard of conduct presumably productive of progress in protection of the public welfare. In such proceedings, private parties have no rightful place except as the court may desire to avail itself of helpful suggestions.

"The exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown." *Allen Calculators, Inc.* v. *National Cash Register Co.,* 322 U.S. 137, 142. Cf. *Missouri-Kansas Pipe Line Co., supra,* 312 U.S. at 506. The denial by the court below of the petitioners' March 8, 1956, application to intervene, as well as its earlier November 28, 1955, application, was neither arbitrary nor an abuse of discretion. It is well settled that "Intervention after judgment is unusual and not often

granted," even where intervention is of right. Moore's *Federal Practice* (2d Ed.), Vol. 4, p. 99.[4]

Neither *Textile Workers Union* v. *Allendale Co.*, 226 F. 2d 765 (C.A.D.C.) certiorari denied, 351 U.S. 909, nor *Wolpe* v. *Poretsky*, 144 F. 2d 505 (C.A.D.C.), cited by petitioners, is in conflict with the ruling below. The differing results in those cases, as is evident from a reading of the opinons, turn largely upon the particular statutory provisions involved; they do not purport to rest on a repudiation of the general rule, followed here, that in situations "dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest * * * the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the *nisi prius* court." *Missouri-Kansas Pipe Line Co., supra*, 312 U.S. at p. 506.

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[4] See also *United States* v. *California Canneries*, 279 U.S. 553, 556; *Smith* v. *Gale*, 144 U.S. 509, 520; *Stallings* v. *Conn*, 74 F. 2d 189, 191 (C.A. 5); *Caldwell* v. *Guardian Trust Co.*, 26 F. 2d 218, 222 (C.A. 8); *Tennessee Coal, I. & R. Co.* v. *Muscada Local 123*, 5 FRD 174, 177 (N.D. Ala.); *Union Nat. Bank* v. *Superior Steel Corp.*, 9 FRD 124, 127 (W.D. Pa.). Cf. Rule 24 of the Federal Rules of Civil Procedure.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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